Y.K. FUNG SECURITIES SDN. BHD.

v.

RONALD YEOH KHENG HIAN

HIGH COURT MALAYA, IPOH
ABDUL MALEK AHMAD J
[CIVIL SUIT NO. 23-550-86]
26 AUGUST 1989

CIVIL PROCEDURE: *Stay of execution - Application by defendant to stay (i) execution of judgment (ii) execution of writ of seizure and sale - Pending appeal - Grounds for application - Non-compliance of O. 47 r. 1(3) Rules of the High Court 1980 - Discretion of the Court - Whether special circumstances exist.*

EVIDENCE: *Oral evidence - Whether admissible in light of s. 92 of the Evidence Act.*

The plaintiff had offered to grant margin trading facility to the defendant for the sale and purchase of shares, which was duly executed. The defendant, in accordance with the agreement executed by him, paid to the plaintiff the requisite deposit and the accrued interest thereon. In an action by the plaintiff for the recovery of the sums owing, the defendant disputed liability by alleging that he had acted as an agent for a third party and that the contract was between the plaintiff and the third party and between him and the plaintiff. The plaintiff applied for summary judgment and the learned Assistant Registrar allowed the application. The defendant appealed against the decision and also, applied by summons-in-chambers for a stay of execution of the judgment and absolute stay of the execution by way of writ of seizure and sale taken out by the plaintiff.

Held: dismissing the appeal and the application for stay;
[1] Where the terms of the contract i.e. the margin agreement and the letter of offer have been executed by the defendant, no oral evidence can be admitted to show that the contract was executed on behalf of a 3rd party.

[2] Mere averments that the plaintiff is heavily indebted is not sufficient to warrant a stay. In any event, granting of stay is a discretion of the Court and in the present facts, the plaintiff is economically stronger than the defendant and as no special circumstance is shown, no stay is granted.

Cases referred to:
Pernas Trading Sdn. Bhd. v. Persatuan Peladang Bakti Melaka [1979] 2 MLJ 124
Re Kong Thai Sawmill (Miri) Sdn. Bhd.; Ling Beng Sung v. Kong Thai Sawmill (Miri) Sdn. Bhd. & Ors. [No. 2] [1976] 1 MLJ 131

Legislation referred to:
Evidence Act 1950, s. 92
Rules of the High Court 1980, O. 47 r. 1(3)

For the plaintiff/respondent - Paul P. Subramaniam & Lee Yen Seong; M/s. Maxwell, Kenion, Cowdy & Jones
For the defendant/appellant - Romesh Roy; M/s. W.Y. Chan & Roy M/s. Henry Lim & Co.

JUDGMENT

Abdul Malek Ahmad J:

The learned Senior Assistant Registrar had ordered final judgment against the defendant on 11 November 1988 for RM607,347.76 together with interests and costs in favour of the plaintiff. Hence this appeal by the defendant.

The plaintiff had applied by way of summons-in-chambers on 9 December 1987 for an order that it be at liberty to sign final judgment against the defendant for the sum claimed in the statement of claim together with interest at 19% per annum from 1 October 1986 to the date of judgment and thereafter at 8% per annum till the date of satisfaction, costs and further relief.

In its supporting affidavit with the relevant documents exhibited, the financial controller of the plaintiff had averred that the claim was in respect of 500,000 Everpeace Corporation shares. The plaintiff had offered to grant margin trading facilities to the defendant to enable him to buy and sell shares on the Exchange which offer was duly executed. The defendant consequently executed a formal margin agreement. The cost of the 500,000 Everpeace Corporation shares amounted to RM758,250 at the time of purchase on 9 October 1985.

As provided in the margin agreement, the defendant was to pay the plaintiff the margin deposit equivalent to 30% of the market value of shares bought. He in fact paid RM227,475 *vide* Standard Chartered Bank cheque no. 122936. By Standard Chartered Bank cheque no. 122946 the defendant had paid interest of RM1,562.20 for the month of October 1985. Statement of accounts had also been sent to the defendant from May 1986 to April 1987.

Learned Counsel for the defendant had argued that the main line of arguments before the learned Senior Assistant Registrar was that oral evidence was not admissible in view of s. 92 of the Evidence Act 1950. He submitted that it did not apply where documents do not constitute a contract as the debit note for the purchase of the 500,000 shares was not signed by the defendant although his name had been typed in and that it stated that the shares were bought on the defendant's order. Counsel further alleged that the contract was actually between the plaintiff and Tan Koon Swan and not between the plaintiff and the defendant.

I had perused the affidavits and the documents relevant to the issue and am not in a position to see the connection with Tan Koon Swan for this claim. The relevant debit note dated 9 October 1985 states the name of the defendant in his personal capacity and the defendant had signed an undated margin agreement with the plaintiff. The offer letter from the plaintiff is dated 17 October 1985 and the defendant had in fact signed below it on 19 October 1985. He had even paid the 30% deposit required under the margin agreement for the shares bought and had paid the interest for October 1985 by letter dated 13 November 1985. The defendant was subsequently furnished with the relevant monthly statements of accounts, twelve, of which had been exhibited, but he had made no objections, protests or queries on the matter.

The defendant had by his affidavit filed on 5 November 1988 attempted to connect the plaintiff with Tan Koon Swan but having referred to the exhibited statement of defence in the other suit namely Ipoh High Court civil suit 23-202-86 where the plaintiff is the defendant and Tan Koon Swan the third party, it is clear that action is founded on an entirely different transaction relating to Grand United Holdings and does not concern the purchase of the Everpeace Corporation shares.

Learned Counsel for the plaintiff had also explained that the debit note had not been signed by the defendant as delivery was never made due to non-payment. By his affidavit dated 4 March 1988, the defendant had admitted signing the plaintiff's offer letter and the margin agreement but he insisted that he had executed the documents as agent for Tan Koon Swan. He alleged that the debit note was the wrong from used as a result of a mistake common to him and the plaintiff. Exhibited to that affidavit is a letter dated 7 October 1985 from Tan Koon Swan to the plaintiff as regards the purchase of Everpeace Corporation shares on 20 October 1985 to Ng & Co. and a Mr. Ng Koon Mun.

This affidavit and documents, to my mind, do not in any way support or substantiate the defendant's contention that he was the agent for Tan Koon Swan as the name of Tan Koon Swan is never mentioned in the documents the defendant signed and the defendant's name is not mentioned in Tan Koon Swan's letter to the plaintiff. In the event, I could not accept the defendant's allegations that he was acting all along as agent of Tan Koon Swan especially when he had paid the 30% deposit and the interest due and had not protested at all to the relevant statements of accounts sent to him.

In *Pernas Trading Sdn. Bhd. v. Persatuan Peladang Bakti Melaka* [1979] 2 MLJ 124, the Federal Court had ruled that where it was quite clear from the sales invoice and the delivery note that the goods were ordered by the respondents, they should not be allowed to bring oral evidence to contradict the terms of the contract and to show that the goods were ordered for a third party. Consequently, I agreed with the learned Counsel for the plaintiff and the learned Senior Assistant Registrar that no triable issues had been raised and dismissed the appeal with costs.

Subsequently, by summons-in-chambers filed on 28 June 1989, the defendant had applied for an order:

[1] that execution on the judgment herein dated 11 November 1988 and all further proceedings thereon be stayed until the determination or other disposal of the appeal to the Supreme Court filed herein or until further order;

[2] that execution on the judgment herein dated 11 November 1988 by writ of seizure and sale at no. 4 Jalan Dato Khong Kam Tak, Ipoh be stayed absolutely or for such period and subject to such conditions as the Court thinks fits.

Learned Counsel for the defendant submitted that the plaintiff was heavily indebted and would utilise the judgment sum for outstanding liabilities as a result of which the defendant would not be able to obtain repayment if he consequently won the appeal.

The defendant had also averred in his supporting affidavit that his last employer had died suddenly in 1982 and that he had ceased to be gainfully employed since the middle of 1984. He had been getting RM8,000 monthly and the loss of a job had resulted in his savings and investments being depleted by the end of 1985. He claimed that his wife and father had been supporting him and his family since 1986. He maintained that he had only RM3,000 worth of property in his wife's house and any execution would harass and humiliate his family. To avoid the embarrassment, he added that his wife and father were willing to deposit RM3,000 in Court as a condition for the stay.

Halsbury's 3rd Edn., Vol. 16 had stated at p. 35 that:

> The Court has an absolute and unfettered discretion as to the granting or refusing of a stay, and as to the terms upon which it will grant it, and will, as a rule, only grant it if there are special circumstances, which must be deposed to on affidavit unless the application is made at the hearing.

The Federal Court in *Re Kong Thai Sawmill (Miri) Sdn. Bhd.; Ling Beng Sun v. Kong Thai Sawmill (Miri) Sdn. Bhd. & Ors.* (No. 2) [1976] 1 MLJ 131 had held that:

> An appeal which would be nugatory if stay was refused by reason of the poverty of the respondent would be an example of special circumstances.

Here, however, one cannot actually say, apart from the averments of the defendant, that the plaintiff was in a state of poverty even if it used the judgment sum obtained here to pay off its other liabilities. Between the two parties, it is obvious that the plaintiff is, economically speaking, the stronger of the two. As for the stay of the writ of sale and seizure, the defendant had not even complied with the requirement under O. 47 r. 1(3) of the Rules of the High Court 1980 in not stating his present income, as he stated that he is now a city councillor, and his assets and liabilities in full.

As a stay is a matter of discretion and as in this case I am of the view that the defendant had not shown any special circumstances to warrant a stay, suggesting a Court deposit of RM3,000 for an appeal where the judgment sum is RM607,347.76 can hardly be said to be a substantial guarantee should the defendant fail in his appeal. In consequence, I had dismissed the defendant's application for stay pending appeal and the stay of execution of the writ of seizure and sale with costs.

Also found at [1989] 2 CLJ 1284